

Holly Hill Fruit Products Co., Inc. and Teamsters Local Union No. 444, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 12-UC-51

May 28, 1981

DECISION ON REVIEW AND ORDER

On July 8, 1980, the Regional Director for Region 12 of the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding in which he denied the Petitioner's request to clarify the currently recognized unit of production and maintenance employees by including the newly created position of tank farm operator. The Regional Director found the tank farm operators to be statutory supervisors. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Petitioner filed a timely request for review of the Regional Director's decision on the ground, *inter alia*, that in finding the tank farm operators to be statutory supervisors who should be excluded from the existing unit, the Regional Director departed from official Board precedent. The Employer filed a brief in opposition to the request for review.

By telegraphic order dated October 2, 1980, the Board granted the request for review. Thereafter, the Employer and the Petitioner each filed a brief on review.

The Board has considered the entire record in this proceeding with respect to the issues under review and makes the following findings:

The Employer is a Florida corporation engaged in the processing of citrus juice products with its facility located in Davenport, Florida. The current collective-bargaining agreement between the Employer and the Petitioner has an effective term running from December 31, 1978, through November 30, 1981. The unit described in the contract is:

All production and maintenance employees employed by the Holly Hill Fruit Products Co., Inc., at its Davenport, Florida plant excluding all agricultural employees, truck drivers, office clerical employees, guards, professional employees and supervisors as defined in the Act.

In April 1980 the Employer began operating a tank farm. This addition to its Davenport facility consists of 18 large tanks for the long-term storage of juice concentrate produced at the plant. The Employer staffed the tank farm with two unit employees, formerly lead blenders, and one new employee. All three employees are now designated as

tank farm operators. Upon the creation of this new position the Petitioner seeks a clarification of the existing unit on the ground that the tank farm operators perform unit work. The Employer, on the other hand, contends that the tank farm operators are supervisors within the meaning of Section 2(11) of the Act, or, in the alternative, that they do not share a sufficient community of interest with the production and maintenance employees. The Regional Director agreed with the Employer's first argument, found it unnecessary to reach the alternative argument, excluded the tank farm operators from the unit, and dismissed the petition.¹ For the reasons set forth below, we find merit in the Petitioner's contention and reverse the Regional Director.

The record discloses that the Employer operates its production facility, including the tank farm, continuously with three 8-hour shifts. One of the tank farm operators is assigned to each shift on a rotating basis. Until approximately 2 weeks prior to the hearing in this case the Employer employed one shift foreman for each shift. They were undisputed 2(11) supervisors and were excluded from the unit. At that time the third-shift foreman resigned. The Employer then decided to place the third-shift tank farm operator "in charge" of that 11 p.m. to 7 a.m. shift and its approximately 15 employees and so informed the tank farm operator.

The Regional Director found that the employees on the third shift then came to the tank farm operator with problems. The Regional Director cited only one such incident and the record reveals no others. An employee informed the tank farm operator of an inoperative production machine. The tank farm operator responded by calling in an electrician from another shift to effect repairs. Based on this incident and the fact that there are no admitted supervisors on the third shift and that its 15 employees would otherwise be without supervision the Regional Director concluded that the 3 tank farm operators are supervisors when serving on the third shift. He relied on *East Bay Newspaper, Inc., d/b/a Contra Costa Times*² and *William O. Hayes, d/b/a Superior Castings Company*.³ Since each tank farm operator rotates through the third shift 2 of

¹ We find no merit in the Employer's contention that the petition was untimely, not having been filed reasonably close to the expiration date of the contract. The Board has held that a unit may be clarified in the middle of a contract term where, as here, the procedure is invoked to determine the unit placement of employees performing a new operation. *Crown Cork & Seal Company, Inc.*, 203 NLRB 171 (1973). Member Jenkins dissented in that case solely on the ground that the petitioner had raised a work assignment rather than a unit placement issue.

² 228 NLRB 692, 696 (1977).

³ 230 NLRB 1179, 1189 (1977).

every 6 weeks, the Regional Director found that the supervisory status is held on a regular basis.

However, the record supports the Petitioner's contention that at the time of the hearing none of the departed third-shift foremen's 2(11) duties had actually been assigned to the tank farm operators. The Employer's vice president for plant production, John May, testified that it was his intention to authorize the tank farm operators to assign work, grant time off, discipline, and direct the third-shift employees. May admitted that the tank farm operators were never told the extent of their contemplated authority.

Larry Otto, the only tank farm operator who testified, stated that he was not specifically assigned responsibility to grant time off or to discipline employees but was merely instructed to "keep everything running." On cross-examination by the Employer's counsel, Otto stated that he "didn't have to keep nothing moving" because "everybody knew their jobs, so all I had to do was be there in case something happened and they needed somebody." Otto also testified that he would tell an employee to go home early only after having received specific authorization to do so.

We are satisfied that at the time of the hearing the tank farm operators were acting as leadmen on the basis of superior technical competence rather than in the exercise of a managerial function. The initiative displayed by a tank farm operator in arranging for a machine repair falls into the former category and therefore does not constitute evidence of supervisory authority.

The cases cited by the Regional Director do not support his rationale that the tank farm operators are supervisors because otherwise the third-shift employees would be unsupervised. In both *Contra Costa Times and Superior Casting Co.*, *supra*, the Board, while giving weight to this factor, relied primarily on findings that the individuals in question also specifically possessed one or more of the 2(11) indicia. Here, however, there is no such evidence. The Board cannot make findings of fact

with respect to an individual's present duties based on an employer's future intentions. The Employer cites no case, and we know of none, where the presence of otherwise unsupervised employees standing alone will support a 2(11) finding.

Having found the tank farm operators to be employees under the Act, we further find that they share a sufficient community of interest with the unit employees to warrant their inclusion in the unit. Prior to his assignment to the new position of tank farm operator, Otto had been a lead blender included within the unit. He testified that his pay and benefits did not change when he became a tank farm operator. Otto's testimony also shows that, while some additional training was necessary, the skills required to operate and monitor the new holding tanks are similar to those required for the unit position of lead blender.

In support of the Employer's contention that the tank farm operators, if found to be employees, should be excluded on community-of-interest grounds, the record shows only that the tank farm operators receive higher pay than any other production employees and that they have different break schedules. These factors are insufficient to require the exclusion of the tank farm operators from the unit.

We therefore find, contrary to the Regional Director, that the occupants of the newly created classification of tank farm operator are employees under the Act and properly included within the recognized unit of production and maintenance employees. We shall clarify the unit accordingly.

ORDER

It is hereby ordered that the existing contractual collective-bargaining unit represented by Teamsters Local Union No. 444, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, be, and it hereby is, clarified by specifically including therein the position of tank farm operator.